

E-FILED on December 22, 2006

Annette W. Jarvis, Utah Bar No. 1649
 Steven C. Strong, Utah Bar No. 6340
 RAY QUINNEY & NEBEKER P.C.
 36 South State Street, Suite 1400
 P.O. Box 45385
 Salt Lake City, Utah 84145-0385
 Telephone: (801) 532-1500
 Facsimile: (801) 532-7543
 Email: ajarvis@rqn.com

Lenard E. Schwartz, Nevada Bar No. 0399
 Jeanette E. McPherson, Nevada Bar No. 5423
 SCHWARTZER & MCPHERSON LAW FIRM
 2850 South Jones Boulevard, Suite 1
 Las Vegas, Nevada 89146-5308
 Telephone: (702) 228-7590
 Facsimile: (702) 892-0122
 E-Mail: bkfilings@s-mlaw.com

Attorneys for Debtors and Debtors-in-Possession

**UNITED STATES BANKRUPTCY COURT
 DISTRICT OF NEVADA**

In re:
 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

Case No. BK-S-06-10725 LBR
 Case No. BK-S-06-10726 LBR
 Case No. BK-S-06-10727 LBR
 Case No. BK-S-06-10728 LBR
 Case No. BK-S-06-10729 LBR

In re:
 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

Chapter 11

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED
 FUND, LLC,
 Debtor.

Jointly Administered Under
 Case No. BK-S-06-10725 LBR

In re:
 USA CAPITAL FIRST TRUST DEED FUND, LLC,
 Debtor.

**USA CAPITAL FIRST TRUST DEED
 FUND, LLC'S OBJECTION TO
 CLAIM NOS. 83, 84, AND 85 FILED
 BY THE PENSION BENEFIT
 GUARANTY CORPORATION**

In re:
 USA SECURITIES, LLC,
 Debtor.

Affects:

- ☐ All Debtors
- ☐ USA Commercial Mortgage Company
- ☐ USA Securities, LLC
- ☐ USA Capital Realty Advisors, LLC
- ☐ USA Capital Diversified Trust Deed Fund, LLC
- ☒ USA Capital First Trust Deed Fund, LLC

Date: January 31, 2007
 Time: 9:30 a.m.

SCHWARTZER & MCPHERSON LAW FIRM
 2850 South Jones Boulevard, Suite 1
 Las Vegas, Nevada 89146-5308
 Tel: (702) 228-7590 · Fax: (702) 892-0122

USA Capital First Trust Deed Fund, LLC (“FTDF”), by and through its counsel and pursuant to 11 U.S.C. § 502 and Fed. R. Bankr. P. 3007, hereby files its objection (“Objection”) to Claim No. 83, Claim, No. 84, and Claim No. 85 (collectively the “Claims”), all filed by the Pension Benefit Guaranty Corporation (“PBGC”). In support of its Objection, FTDF states as follows:

I. JURISDICTION

1. Under 28 U.S.C. §§ 157(b)(2)(B) and 1334, this Court has jurisdiction to hear this Objection. The relief requested is available under 11 U.S.C. § 502.

II. BACKGROUND

2. On April 13, 2006 (the “Petition Date”), FTDF filed a voluntary petition for relief under chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”), in the United States Bankruptcy Court for the District of Nevada (“Court”). USA Commercial Mortgage Company (“USACM”), USA Capital Diversified Trust Deed Fund, LLC (“Diversified”) (and together with FTDF, the “Funds”), USA Capital Realty Advisors, LLC (“USA Realty”), and USA Securities LLC (“USA Securities”) (collectively with FTDF the “Debtors”) also filed voluntary petitions under chapter 11 of the Bankruptcy Code the same day. All five of the Debtors’ bankruptcy cases are being jointly administered [Docket No. 184].

3. On May 10, 2006, the United States Trustee filed notice that an Official Committee of Equity Security Holders of FTDF had been formed. No trustee or examiner has been appointed and FTDF continues to operate its business, if any, as the debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. FTDF is a Nevada limited liability company organized as of February 16, 2001.

5. FTDF did not at any time have any employees nor was it required to contribute to a defined pension benefit plan.

6. As of the Petition Date, FTDF had approximately 950 members.

7. The PBGC filed the Claims on November 9, 2006. Claim No. 83 seeks \$884,389 for the unfunded benefit liabilities of the USA Commercial Mortgage Company Defined Benefit Pension Plan (“Pension Plan”). Claim No. 84 seeks \$1,068,233 for the unpaid minimum funding

1 contributions to the Pension Plan. Claim No. 85 is for Pension Plan insurance premiums including
 2 interest and penalties in an unliquidated amount. PBGC has filed the exact same claims against
 3 each of the five Debtors.

4 **III. APPLICABLE AUTHORITY**

5 8. Pursuant to section 502(a) of the Bankruptcy Code, any claim for which a proof of
 6 claim has been filed will be allowed unless a party in interest objects. If a party in interest objects
 7 to the proof of claim, the court, after notice and hearing, shall determine the amount of the claim
 8 and shall allow the claim except to the extent that the claim is “unenforceable against the debtor
 9 . . . under any . . . applicable law for a reason other than because such claim is contingent or
 10 unmatured.” 11 U.S.C. § 502(b).

11 9. A properly filed proof of claim is presumed valid under Bankruptcy Rule 3001(f).
 12 However, once an objection to the proof of claim controverts the presumption, the creditor
 13 ultimately bears the burden of persuasion as to the validity and amount of the claim. *See Ashford*
 14 *v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 226 (B.A.P.
 15 9th Cir. 1995), *aff’d*, 91 F.3d 151 (9th Cir. 1996).

16 **IV. OBJECTION TO THE PBGC’S CLAIMS**

17 10. FTDF objects to each of the Claims that the PBGC has asserted against it.

18 11. The PBGC argues that FTDF is liable under each of the Claims because it is either
 19 a “contributing sponsor” under 29 U.S.C. § 1301(a)(13) or a member of the contributing sponsor’s
 20 “controlled group” under 29 U.S.C. § 1301(a)(14).

21 12. FTDF is neither the “contributing sponsor” of the Pension Plan nor a member of
 22 the contributing sponsor’s “controlled group,” as those terms are defined in their respective
 23 sections.

24 13. The “contributing sponsor” of a benefit plan is the employer responsible for
 25 making contributions to the benefit plan. *See* 26 U.S.C. § 412(c)(11)(A). USACM is the
 26 employer responsible for making contributions to the Pension Plan. FTDF has no employees and
 27 is not a “contributing sponsor” of the Pension Plan.

28 14. In defining “controlled group,” 29 U.S.C. § 1301(a)(14) looks to section 1563(a) of

1 title 26 of the United States Code (the “Internal Revenue Code”). Under the applicable provisions
 2 of section 1563(a), FTDF would be a member of USACM’s controlled group only if FTDF was a
 3 member of a parent-subsidary or brother-sister controlled group of the Pension Plan. FTDF is
 4 neither a member of a parent-subsidary nor a brother-sister controlled group of the Pension Plan.
 5 These controlled groups are based on common, concentrated ownership. FTDF, with its 950
 6 different equity members, has a separate and distinct ownership from the controlled group
 7 members of the Pension Plan and, therefore, is not a member of the “controlled group” as that
 8 term is defined in 29 U.S.C. § 1301(a)(14).

9 15. The PBGC’s Claims against FTDF, therefore, are unenforceable under applicable
 10 law for reasons other than because the Claims are contingent or unmatured, and they should be
 11 disallowed in their entirety under section 502(b) of the Bankruptcy Code.

12 16. FTDF expressly reserves the right to raise any additional objections against the
 13 Claims or any other claims filed by the PBGC or any other claimant.

14 17. FTDF further requests that, to the extent that the PBGC does not file a response to
 15 this Objection, the Court enter an order disallowing the Claims.

16 V. CONCLUSION

17 18. FTDF requests that the Court disallow Claim No. 83, Claim No. 84, and Claim No.
 18 85, all filed by the PBGC, because these Claims are not enforceable against FTDF under
 19 applicable law, and requests that the Court grant such other and further relief as is just and proper.
 20 Respectfully submitted this 22nd day of December, 2006.

21
 22 /s/ Jeanette E. McPherson

23 Lenard E. Schwartz, Nevada Bar No. 0399
 24 Jeanette E. McPherson, Nevada Bar No. 5423
 25 SCHWARTZER & MCPHERSON LAW FIRM
 26 2850 South Jones Boulevard, Suite 1
 27 Las Vegas, Nevada 89146
 28 and
 Annette W. Jarvis, Utah Bar No. 1649
 Steven C. Strong, Utah Bar No. 6340
 RAY QUINNEY & NEBEKER P.C.
 36 South State Street, Suite 1400
 P.O. Box 45385
 Salt Lake City, Utah 84145-0385